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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 657

PAUL M. BEDDOW,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Alabama.

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No. .....

PAUL M. BEDDOW,
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vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Alabama.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree of the Alabama Court of Appeals entered upon December 4, 1956, and confirmed upon rehearing February 19, 1957, wherein petitioner's conviction of fifteen (15) years for assault with intent to rob was affirmed.

OPINION BELOW.

The opinion below entered upon December 4, 1956, and adhered to upon rehearing is printed in an appendix to this petition, for the convenience of this Court.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under **28 U. S. C. A., Section 1257 (3).**

The judgment of the Court of Appeals of Alabama affirming the decision of the Circuit Court in this cause was entered December 4, 1956.

Timely application for a rehearing was made to said Court of Appeals and by said Court overruled February 19, 1957.

Timely application for Writ of Certiorari was made to the Supreme Court of Alabama and by said Supreme Court denied April 25, 1957.

Timely application for a rehearing was made to the Supreme Court of Alabama and by said Court overruled June 27, 1957.

Timely motion to Stay Issuance of Mandate Pending Petition for Certiorari was made to the Supreme Court of the United States and by said Court was granted September 25, 1957, staying issuance of Mandate thirty days until October 25, 1957.

Subsequent to September 25, 1957, the Supreme Court of the United States extended the Stay of Issuance of Mandate Pending Petition for Certiorari up to and including November 25, 1957.

QUESTIONS PRESENTED.

The questions presented here for determination are important, but may be stated briefly. They are as follows:

1. Whether the petitioner received a fair trial as guaranteed him under the Constitution of the United States, Article V and Article XIV, Section One, when there were some twenty-odd sensational newspaper stories about his alleged confession and in the face of this he was denied a

change of venue although the state put on no evidence to rebut the evidence of the petition in his motion for a change of venue. The fact that petitioner received a fifteen year sentence by the trial judge also should point out that he did not receive a fair trial.

2. Whether the Court of Appeals erred when it ruled in effect that defendant's motion for a change of venue was properly denied.

3. Whether the Court of Appeals erred when it ruled in effect that insanity must be established to the satisfaction of the jury by a preponderance of the evidence.

4. Whether the Court of Appeals erred in affirming the lower Court's ruling where the motion to quash the indictment was overruled.

5. Whether the Court of Appeals erred in holding that the defendant's motion for continuance was properly ruled upon.

6. Whether the Court of Appeals erred in failing to hold that the demurrers to the indictment were good.

7. Whether the Court of Appeals erred in refusing to reverse the case because of the trial court's refusal to give certain written charges requested by the defendant.

8. Whether the Court of Appeals erred in holding that malice is an essential element of the offense of assault with intent to rob.

9. Whether the Court of Appeals erred in sustaining the trial court's ruling on the Motion for New Trial.

10. Whether the Court of Appeals erred in sustaining the trial court's ruling which prevented the defendant's attorney from filing a Motion for Continuance before the jury was struck.

11. Whether the Court of Appeals erred in holding that the confession of the defendant was a voluntary confession.

STATUTES INVOLVED AND ARTICLES OF THE UNITED STATES CONSTITUTION INVOLVED.

Article V, Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article XIV, Constitution of the United States.

Section One. All persons born, or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Title 15, Section 422, Code of Alabama, 1940, Annotated.

Every person over fourteen years of age and charged with crime is presumed to be responsible for his acts, and the burden of proving that he is irresponsible is cast upon the accused. The defense of insanity in all criminal prosecutions shall be clearly proved to the reasonable satisfaction of the jury.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred:

1. In affirming the judgment of conviction.

2. In holding that the defendant received a fair trial.

3. In holding that defendant's motion for change of venue was properly denied.

4. In holding that on a plea of insanity, the burden was upon the defendant to establish his insanity to the satisfaction of the jury by a preponderance of the evidence.

5. In holding that defendant in his intoxicated condition had a specific intent to rob.

6. In holding that defendant's motion for a continuance was properly ruled upon.

7. In holding that the trial court did not err in its oral charge to the jury.

8. In holding that the trial court was not in error in its refusal to give certain written charges requested by the defendant.

9. In holding that the trial court did not err in overruling defendant's motion for new trial.

10. In holding that the trial court was not in error in its refusal to permit defendant to file motion for continuance.

11. In holding that the alleged confession of the defendant was voluntary and admissible in evidence.

SUMMARY STATEMENT.

The petitioner, a police officer of the city of Birmingham, Alabama, was convicted of assault with intent to rob in a Jefferson County, Alabama, Circuit Court. The facts (set out in more detail in the accompanying brief) briefly were as follows: Petitioner and a friend drove an automobile near the premises of a filling station in Birmingham, Alabama. The petitioner entered the station with his face covered by a mask and told the owner that this was a stick-up. The owner fought with the petitioner and petitioner, after a struggle, left the scene. No money was taken. Petitioner left his pistol at the scene and his license tag number was taken down by a witness. Later petitioner fled to Texas where he was apprehended. He did not give a confession until several days after two of his superior officers came to Texas. One of them told him that he would probably be eligible for probation and he wouldn't oppose it if he, the petitioner, would give a statement and come on back to Alabama. There were some twenty-odd sensational newspaper stories over a period of many days publicizing this incident. Petitioner filed a motion for a change of venue contending that since he was a police officer and since the newspapers had put so much in the papers about his alleged confession he could not get a fair trial. This request for a change of venue was denied. A motion for new trial was filed, after the petitioner had been sentenced to fifteen years, and the said motion was denied. Petitioner is presently out on bail in the amount of ten thousand dollars.

Petitioner, Paul M. Beddow, was indicted by the Grand Jury of Jefferson County charged of assault with intent to rob (R. p. 1). Petitioner's motion for change of venue (R. p. 1-6) was overruled (R. p. 10). Petitioner also filed a motion to quash the indictment (R. p. 6), which was overruled (R. p. 10). Petitioner's motion for a continuance (R. pp. 7 and 8) was granted (R. p. 10). Petitioner's

demurrer to the indictment (R. p. 9) was also overruled (R. p. 10). The state's motion for a sanity hearing (R. p. 11) was granted (R. p. 12). Petitioner's second motion for a continuance (R. p. 2a) was overruled (R. p. 5a). Upon pleas of not guilty and not guilty by reason of insanity, trial was had and the jury returned a verdict of guilty (R. p. 12). The Court accordingly adjudged petitioner guilty and sentenced him to imprisonment for fifteen years (R. p. 12). Petitioner's motion for a new trial (R. pp. 30-51) was overruled (R. p. 52). From this judgment and sentence this appeal is taken (R. p. 13).

REASONS FOR GRANTING THE WRIT.

This case presents questions of great public importance involving the rights guaranteed its citizens under our Constitution. It presents the question of just how much proof a defendant must produce to show that he is entitled to a change of venue. It is inconceivable to believe that a police officer who allegedly commits an assault with intent to rob can receive a fair trial in the county in which the alleged crime is committed. Especially is this true when the newspapers ran some twenty-odd stories for many, many days publicizing the incident. The lower court's decision, in effect, held that the doors of the jail must be battered down and the prisoner dragged out before he would be entitled to a change of venue.

Although it might seem to be a well settled question as to the admissibility of a confession the lower court held that the petitioner's confession was voluntary although the record showed that one of the arresting officers told the petitioner that he would be eligible for probation and that he would not oppose it providing that the petitioner came back and made a statement. The petitioner had refused to confess up until this inducement was made by the superior officer.

The motion to quash the indictment and the demurrers to the indictment alone should present reason for granting

the writ. Those motions will show conclusively that the defendant did not receive a fair consideration by the trial judge.

The second motion for continuance was denied although the reasons cited therein should prove to this court that the defendant did not receive a fair trial. The fact that the trial court also refused a great deal of jury charges which were applicable to the law could also add to the fact that the petitioner did not receive a fair trial. The lower court's decision in holding that malice was an essential element in the offense of assault with intent to rob placed too great of a burden upon the petitioner in his proof; this coupled with the fact that the court required a greater burden of proof to prove his plea of insanity should also present an interesting question for this court to review.

Perhaps the most important reason in granting the writ, other than the first reason advanced, is the fact that the court held that the confession was a voluntary confession. This confession alone probably would have convicted the petitioner and the fact that the court held that it was voluntary deprived the defendant of his rights guaranteed him under our Constitution. The trial judge in sentencing petitioner to fifteen years clearly wanted to make an example out of him although a citizen, even though a police officer, is entitled to a fair trial and he should not have been given such a term not commensurate with the offense.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Court of Appeals of Alabama should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Evidence for the State:

On the night of October 23, 1953, Thomas Laydon Pierce, a witness for the State, testified that he was operating a filling station on 6th Avenue, South and 14th Street, in Jefferson County, Alabama. Some man, wearing a mask came into the filling station in a kind of trot, and said, "This is a stick-up." Pierce and the man scuffled and Pierce twisted the pistol out of the man's hand and the man ran to an automobile. Pierce got his hand hurt during the struggle. After the incident a police car, cruising by the station, was hailed. Two policemen went into the filling station to talk with Pierce.

The next witness for the State was Henry Lucky (Tr. pages 18A-22A).

Henry testified he worked for Pierce and was at the filling station on the night of October 23, 1953; and that he saw a man get out of a car and come into the filling station. The man said, "It is a stick-up." The man had on a corduroy shirt and blue pants and cap, and a white handkerchief on his face. Pierce was counting his money and the man pointed his gun at him and said, "This is a stick-up." Mr. Pierce grabbed the man's hand which held the gun and began struggling with him. During the struggle a gun went off. He stated, "I saw a black car that the man came up in, but I couldn't tell what kind it was".

Mr. H. E. Wear was the next witness for the State (Tr. pages 22A-28A).

Mr. Wear testified he was on the way to work between 10:00 and midnight on the night of October 23, 1953. He was in the vicinity of the filling station on 6th Avenue,

South and 14th Street, which Mr. Pierce was operating. He noticed that a car stopped at the intersection. He saw the car door swing open and a man get out, make a break and run into the filling station. The car was of a dark color. He saw the man run from the filling station and jump into the car. He followed the car and later wrote down the number of the license and gave same to Pierce. He and Pierce gave the license tag number to the officers of the patrol car. Mr. Wear did not, in his testimony, give the number of the tag on the car, only the county number 58.

The next witness for the State was J. H. Lakey, a patrolman for the city of Birmingham (Tr. pages 28A-33A).

He testified that on the night of October 23, 1953, between 11:00 and midnight, he and Officer Garrett happened to be cruising by the Pierce filling station. Someone hollered to them from the station and they stopped. Pierce made a complaint to them and handed over to them a pistol, exhibited by the State as Exhibit "B". Lakey testified it was the pistol that Pierce told him the man had dropped.

This testimony was objected to by defendant, but was overuled by the Court and defendant excepted (Tr. pages 28A-32A).

On redirect examination, Mr. Lakey testified that Mr. Pierce gave him the number of the tag on the automobile that the man, whose alleged attempt to rob the filling station, got out of and drove off. The number of 58-2336. From that number, Mr. Lakey called Police Headquarters and gave the switchboard the number of the tag.

The next witness for the State was John J. Pettino, City Detective for the city of San Antonio, Texas Police Department (Tr. pages 33A-42A).

Over the objection of the defendant, an alleged statement of the defendant was introduced on the behalf of the State (Tr. pages 36A-38A).

Detective Pettino testified, "This is a statement that Paul Beddow dictated to me on the 25th day, 10th month of the year 1953, at approximately 5:45 P. M." When Pettino furnished the above quoted answer, the solicitor stated:

Q. Was that taken on the 10th and 27th? I believe——

A. It was taken on the 10th and 27th.

It was taken on the 10th and 27th, 1953.

Said written statement is designated as State's Exhibit "E."

Pettino testified that said written statement was taken by him and signed by Beddow in the homicide office, San Antonio, Texas (Tr. pages 33A-42A).

The next witness for the state was L. E. Parker, Jr. (Tr. pages 43A-45A).

Parker testified that prior to October 23, 1953, defendant borrowed his pistol. Parker stated that he loaned his pistol to the defendant about the 12th of October, 1953. The defendant gave as a reason for borrowing it that he had dropped his gun while cleaning it and had bent the handle and had to send it to the factory for repairs. He further testified that it is customary in the Police Department when one officer has trouble with his gun, he will try to borrow another gun from a fellow officer (Tr. pages 43A-45A).

Next witness for the State was Gary Thomas Rowe, Jr., ambulance driver, who roomed in an adjoining room in the same part of the building in which the defendant lived (Tr. pages 45A-56A).

He testified that he saw the defendant and accomplice Steve Hunter in an alley in a car. The car had an out of county tag. The witness was in his room, no lights were on in the room and he was looking out the window from a dark room. Witness saw the defendant in a convertible

Mercury. He testified that Steve Hunter and some unidentified girl were with the defendant when they left. They later returned and the witness saw the defendant and Steve Hunter take a television set and a couple of jugs and a black leather bag of clothes and put same in the car. The witness was of the opinion the jugs contained alcoholic beverages. On cross-examination, the witness stated that he would say it was about five jugs. They put the whiskey and the television set in the back seat. They made two trips to the apartment. It was on the last trip they got the television set.

Lt. Glenn V. Evans testified next for the State (Tr. pages 57-65).

As a lieutenant of detectives for the City of Birmingham he received a complaint of an alleged robbery occurring on October 23, 1953. Shortly after four on the following Monday, October 26th, Lt. Evans left for San Antonio, Texas. He saw the defendant in San Antonio and witness stated that defendant made a statement to him in San Antonio concerning the alleged robbery attempt, but it was not made the first day he arrived. Witness stated that defendant made an oral statement to the witness (Tr. pages 59-60). The oral statement was made to Lt. Evans before defendant met Detective Pettino. Lt. Evans stated that before the defendant made the alleged written statement to Det. Pettino, he, Lt. Evans, told the defendant that, "If he had no previous record, that he would be, if he wanted to come and plead guilty, he would probably be eligible to apply for probation." Lt. Evans told the defendant then and there that he, Lt. Evans, would not oppose probation. Lt. Evans further told the defendant that, "We had a warrant charging him with assault with intent to rob and that was the only warrant that we proposed to obtain against him."

Up to the period of time Lt. Evans told the defendant he would probably be eligible for probation and that Evans

would not oppose probation the defendant had denied he had any part in the attempted robbery. He had not made the alleged oral statement to Evans nor had he given the written statement to Pettino until Evans made the inducement.

Lt. Evans in a further conversation with the defendant in San Antonio told the defendant that he knew of other offenses which were more serious than this and offenders who had been given bond and the defendant was entitled to a reasonable bond. It was after these statements and inducements on the part of Lt. Evans that the defendant made the oral statement and the written statement (Tr. pages 57-65).

Contrary to the above statement made by Lt. Evans to the defendant which induced him to make a statement and to return voluntarily, without extradition, the defendant returned to Birmingham and his bond was fixed at $25,000.00.

This was found to be a wholly unreasonable bond by the Supreme Court of Alabama on habeas corpus appeal and the Supreme Court reduced the defendant's bond to $5,000.00 (Tr. pages 66-75).

Captain Ben F. Walker, Captain of Police, City of Birmingham, testified that the pistol delivered to him by Lt. Evans was a .38 Smith and Wesson nickel plated, approximately a five inch barrel; that it was the defendant's pistol; that it was a five inch barrel; that it was the defendant's pistol; that it was his private pistol. He stated further that the auto tag shown as the State's Exhibit "F" was a direct picture of the defendant's tag. He stated that the license tag on the back of the defendant's car was 58-2608. (Different number from others.)

Evidence for the Defendant:

Miss Virginia Whatley, an employee at the Tel-Hop Drive-In (Tr. pages 80-85).

Miss Whatley testified that the defendant was drinking when he entered the Tel-Hop Drive-In at about 9:00 on the night of October 23, 1953. He came back to the Tel-Hop Drive-In about 11:00 p. m. that night and was so drunk he could hardly walk; he was so drunk he fell on a chair when he started to leave and when he started to get into the car he fell out of it twice. He, also, lost his car keys. Defendant was so drunk he couldn't drive the car and witness refused to serve him anything to drink when he came in about 11:00 p. m. Witness stated she was familiar with defendant's habits and that when he is drinking he is not the same man; that when he is drinking he is insane. When witness saw him about five minutes before eleven o'clock on the night of October 23, 1953, he was insane. He was so drunk he did not know what he was doing (Tr. pages 79-85).

Ada Avery, a witness for the defendant, testified that she now works for Mrs. Bates, an aunt of the defendant (Tr. pages 86-91). She testified that she worked for the defendant when he was housekeeping; that she has known the defendant since he was a little boy; that she has noticed a change in the defendant's mind since he returned from the Navy; that when the defendant drinks he is a nervous wreck; that he doesn't know what he is doing when he drinks; that the defendant, while drinking, took the telephone and threw it in the floor and jumped on it; he took his shirt and tore the buttons from it; he would break lamps; he would go to the window and take his fist and break panes from the window; he would tear the window up, he would tear the glass out; he would break the mirrors and cut himself and bring the blood and put it all around the wall of the house. The defendant didn't know what he was doing when he was drunk. Witness saw the defendant about 4:00 or 5:00 o'clock on the evening of October 23, 1953 (the evening of the offense). At that time he was drinking heavily.

Mrs. Burdett Bates, aunt of and witness for the defendant (Tr. pages 91-97), testified that defendant had on occasions in the past lived at her house; that defendant was staying at her house shortly before the alleged offense was supposed to have taken place. She had some of the defendant's clothes at her house. Mrs. Bates noticed a change in the defendant after he returned from service with the Marine Corps. He was in the Marines instead of the Navy. Defendant was only seventeen years of age when he went into the Marines. He was in combat when Pearl Harbor was attacked on December 7th; he was with the Marines on the Lexington at the time it was sunk and when he returned from his service duty he was a nervous wreck. He took up drinking during the war. Immediately before the alleged assault with intent to rob, the defendant showed symptoms of an insane man at the time. He was insane when he was under the influence of liquor. He, on various occasions, would smash things; he seemed to have a particular desire to smash glass, he tore his clothes, he tore buttons off his clothes, but he didn't know what he was doing. He smashed his fist through the glass; he smashed the mirror on the dresser into pieces, but he didn't know what he was doing at the time. On one occasion after he had smashed a glass with his fist his wife took him to a doctor to have the hand stitched and then took him back to the doctor to have the stitches removed and the defendant didn't remember anything about it. On many occasions the defendant would get in his car at night, go for long drives in the middle of the night and on numerous occasions she would go out and try to find him. On one occasion he borrowed her son's car and then started drinking. He called his wife during the night and told her he was going to Jacksonville, Florida, in the car. Mrs. Bates and her son started about midnight that night and went as far as Tifton, Georgia, trying to find him. They never did. Defendant was in the hospital due to drinking and nervousness during September of 1952. At that

time he was worse than he had ever been. Mrs. Bates had discussed the mental condition of defendant with doctors here in Birmingham. She tried to get him to go to a psychiatrist for treatment. One morning at about a quarter of three the defendant came to her bedroom door and said, "Nellie, please get up and talk to me." She got up, went into the kitchen and made coffee. He said, "Is there anyone who can help me?" He also said, "I am lost, I am lost, I am lost." In the late spring or the early part of the summer of 1953, he asked her to ride around with him, which she did. He went back home with her in the morning and told her that night that for the past six years he had felt like he was tied in knots inside. The following Sunday night he called her and asked her if he could come out. It was midnight when he got there and he laid on the couch and talked to her. Finally he asked her to get her Bible and read the twenty-third Psalm, which she did. He then asked her to read same three times, which she did. When he was at the height of his drunkenness he was insane (Tr. pages 91-97).

The following officers of the Birmingham Police Department testified that the defendant's reputation is good: L. E. Bates, Dan Poe, W. T. Nixon, E. F. Mitchell, Asst. Chief of Police Earnest H. Brown, L. E. Parker, J. H. Lakey and N. R. Daniel.

In addition to the above policemen who testified that the defendant's reputation is good, the following witnesses, also, testified that defendant's reputation was good: Dave Moxley, Thelma Perkins, Bob Perkins, Mrs. Mary S. Hawthorne, Mrs. Belle Rose, Allen Bates and Miss Anne Beddow (Tr. pages 79-124).

Miss Anne Beddow, a registered nurse and an anesthetist for thirty years, and an aunt of the defendant, has known the defendant since he was nine months old (Tr. pages 119-124). She testified that defendant went into the Marine Corps when he was seventeen years old; that he

was on the aircraft carrier Lexington, when it was sunk; that she saw his hands where he held on to a rope while he was in the water; that his hands were torn and badly bruised; that he was in the water over three hours; that he was definitely a changed man when he came back; he was emotionally unstable after he came back, yet he returned to more combat, went to Guadalcanal, Bougainville and Iwo Jima and many other places. He has six battle stars; he was, also, in the battle of the Coral Sea. When he returned again from combat his condition was worse. She discussed this condition with his wife and with Mrs. Bates and with his physician. She recommended to him that he take psychiatric treatment, but he resented it. He was insane. She has spent nights at his home and the next day he would never know that she had been there. She also stated that she had been in the home at night and because of his condition it didn't seem safe for his wife to be there. He broke mirrors, windows and glass. His actions show he is suffering from a form of mania. At times, his conduct appears that of a manic, depressed person. At times he is of unsound mind (Tr. pages 120-124).

State Rebuttal Testimony.

Doctor Frank A. Kay, a witness for the state, testified in rebuttal that he observed the defendant for a period of one hour. He made no laboratory tests, no blood tests or any other test other than talking to the defendant for one hour. He testified in his opinion the defendant was not insane at the time he observed him (Tr. pages 125-142).

Doctor Wilmot Littlejohn, a witness for the state in rebuttal, also testified that he observed the defendant for about one hour and he made no tests, no blood test or any other test other than talking to the defendant for a period of approximately one hour. In his opinion the defendant was not insane at the time he observed him (Tr. pages 143-150).

Assignment of Error.

The Court of Appeals erred:

1. In affirming the judgment of conviction.

2. In holding that the defendant received a fair trial.

3. In holding that defendant's motion for change of venue was properly denied.

4. In holding that on a plea of insanity, the burden was upon the defendant to establish his insanity to the satisfaction of the jury by a preponderance of the evidence.

5. In holding that defendant in his intoxicated condition had a specific intent to rob.

6. In holding that defendant's motion for a continuance was properly ruled upon.

7. In holding that the trial court did not err in its oral charge to the jury.

8. In holding that the trial court was not in error in its refusal to give certain written charges requested by the defendant.

9. In holding that the trial court did not err in overruling defendant's motion for new trial.

10. In holding that the trial court was not in error in its refusal to permit defendant to file motion for continuance.

11. In holding that the alleged confession of the defendant was voluntary and admissible in evidence.

PROPOSITIONS OF LAW.

PROPOSITION I.

Change of Venue.

Where the defendant in a criminal prosecution shows to the reasonable satisfaction of the Court that an impartial trial and unbiased verdict cannot be reasonably expected, his application for change of venue should be granted and the venue changed by the Court.

Assignment of Errors Nos. One, Two, Three and Nine.

AUTHORITIES.

Ex Parte Chase, 43 Ala. 303;
Godau v. State, 179 Ala. 27, 60 So. 908;
Baker v. State, 209 Ala. 142, 95 So. 267;
Title 15, Section 267, Alabama Code 1940.

PROPOSITION II.

Change of Venue.

The refusal of an application for change of venue in a criminal case may, after final judgment, be reviewed and revised on appeal, and the Appellate Court shall reverse and remand or render such judgment on said application as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on the application.

Assignment of Errors Nos. One, Two, Three and Nine.

AUTHORITIES.

Ex Parte Chase, 43 Ala. 303;
Godau v. State, 179 Ala. 27, 60 So. 908;

Maund v. State, 254 Ala. 452, 48 So. 2d 553;
Seams v. State, 34 Ala. 410, 4 So. 521;
Title 15, Section 267, Alabama Code 1940.

PROPOSITION III.

Specific Intent.

If a defendant charged with a crime requiring a specific intent is shown to have been so intoxicated that he was incapable of entertaining that intent, he cannot be convicted of the crime, not because we contenance drunkenness as a mitigating circumstance, but because he did not commit the crime charged.

Assignment of Errors Nos. One, Five and Nine.

AUTHORITIES.

Ray v. State (1952), 357 Ala. 418, 59 So. 2d 582;
People v. Burkhart (1931), 211 Cal. 726, 297 Pac. 11;
Britts v. State (1947), 158 Fla. 839, 30 So. 2d 363;
People v. Bartz (1931), 342 Ill. 56, 173 N. E. 779;
People v. Cozzie (1948), 397 Ill. 620, 74 N. E. 2d 685;
Booher v. State (1901), 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391;
State v. Guthridge (1913), 88 Kan. 846, 129 Pac. 1143;
Lear v. Comm. (1949), 307 Ken. 602, 212 N. W. 2d 106;
State v. Alexander (1949), 215 La. 245, 40 So. 2d 232;
State v. Sidall (1926), 125 Me. 463, 123 Atl. 691;
Comm. v. Parsons (1901), 195 Mass. 560, 81 N. E. 158;
People v. Jones (1924), 228 Mich. 426, 200 N. W. 158;
Bullock v. State (1943), 195 Miss. 240, 15 So. 2d 285;
Turz v. State (1951), 154 Neb. 641, 48 N. W. 2d 761;
State v. Fisko (1931), 58 Nev. 65, 70 2d 1113;
State v. Close (1930), 106 N. J. L. 321, 148 Atl. 764;
State v. Tansimore (1950), 3 N. J. 516, 71 A. 2d 169;
State v. Alston (1936), 210 N. C. 258, 186 S. E. 354;
State v. Creech (1949), 229 N. C. 662, 51 S. E. 2d 348;

Rucher v. State (1928), 119 Ohio St. 189, 162 N. E. 802;
Copperfield v. State (1927), 37 Okla. Cri. 246, 30 P. 2d 717;
Calvert v. State (1934), 55 Okla. Cri. 245, 30 P. 2d 717;
Comm. v. Simmons (1949), 361 Pa. 391, 65 A. 2d 353;
State v. Vanasse (1919), 42 R. I. 278, 107 Atl. 85;
Walden v. State (1942), 178 Tenn. 71, 156 S. W. 2d 385;
Barnett v. State (1942), 144 Texas Crim. 249, 162 S. W. 411;
Hempton v. State (1901), 111 Wis. 127, 86 N. E. 596;
Gusteverson v. State (1902), 10 Wyo. 300, 68 Pac. 1006;
Director of Public Prosecution v. Beard (1920), A. A. 479.

PROPOSITION IV.

Insanity.

An instruction on insanity that defendant must satisfy the jury by a preponderance of testimony is erroneous in requiring more than the "reasonable satisfaction" prescribed by statute.

Assignment of Errors Nos. One, Two, Four and Nine.

AUTHORITIES.

Smith v. State (1913), 182 Ala. 38, 62 So. 184;
Wingard v. State (1946), 247 Ala. 488, 25 So. 2d 170;
Grissom v. State (1947), 33 Ala. 43, 31 So. 953;
Parsons v. State (1896), 81 Ala. 577, 2 So. 854;
Lide v. State (1901), 133 Ala. 43, 31 So. 953;
Martin v. State (1898), 119 Ala. 1, 25 So. 255;
Thomas v. State (1922), 207 Ala. 244, 92 So. 244;
James v. State (1910), 167 Ala. 14, 52 So. 840;
Anderson v. State (1923), 209 Ala. 36, 95 So. 171;
Birchefield v. State (1928), 217 Ala. 225, 115 So. 297.

PROPOSITION V.

Continuance.

Motion for continuance is addressed to the sound discretion of the trial court, but the judgment of the trial court will be disturbed on appeal where there is an abuse of such discretion.

Assignment of Errors Nos. One, Two, Six, Nine and Ten.

AUTHORITIES.

Knowles v. Blue, 95 So. 841, 209 Ala. 27;

Ala. 1843. Evans v. Bolling, 5 Ala. 550;

Ala. 1845. Planter's and Merchant's Bank of Mobile v. Willis & Co., 5 Ala. 770;

Ala. 1845. Planter's and Merchant's Bank v. Walker, 7 Ala. 926;

Ala. 1865. Ex Parte Hunter, 39 Ala. 560;

Ala. 1870. Ex Parte South & N. A. E. Co., 44 Ala. 654;

Ala. 1871. Dudley v. Witter, 46 Ala. 665;

Ala. 1878. Trammell v. Vane, 62 Ala. 301;

Ala. 1891. Ala. G. S. R. Co. v. Hill, 9 So. 722, 93 Ala. 514, 30 Sm. St. Rep. 65;

Ala. 1891. Smith v. Collins, 19 So. 334, 94 Ala. 394;

Ala. 1909. Birmingham Paint & Roofing Co. v. Gillespie, 50 So. 1032, 163 Ala. 408;

Ala. 1915. Southern Ry. Co. v. Brown, 68 So. 321, 192 Ala. 389;

Ala. 1928. Stollenwerch v. Thorington, 115 So. 302, 217 Ala. 200;

Ala. 1928. Union Indemnity Co. v. Webster, 118 So. 794, 218 Ala. 468;

Ala. 1929. Morris v. McElroy, 122 So. 608, 219 Ala. 369, denying certiorari 122 So. 606, 23 Ala. App. 96;

Ala. Spp. 1916. Pensacola St. A. G. S. S. Co. v. Brooks, 70 So. 968, 14 Ala. App. 364.

PROPOSITION VI.

Oral Charge.

In the trial of a criminal case the law imposes upon the Court the mandatory duty of instructing the jury orally as to the different and distinguishing elements of the offenses charged. An improper charge concerning the elements of the offenses or the failure to properly define these elements for the jury constitutes reversible error.

Assignment of Errors Nos. Seven, Eight and Nine.

AUTHORITIES.

Gilbert v. State, 32 Ala. App. 200, 23 So. 2d 22;
Garth v. State, 8 Ala. App. 23, 62 So. 383;
Bradberry v. State, 67 So. 2d 561;
Chappell v. State, 15 Ala. App. 227, 73 So. 134;
Boulden v. State, 102 Ala. 78, 15 So. 341;
Thompson v. State, 23 Ala. App. 300, 134 So. 679;
Henderson v. State, 172 Ala. 415, 55 So. 816;
Kennedy v. State, 208 Ala. 66, 93 So. 822.

PROPOSITION VII.

Written Charges.

The defendant in a criminal case is entitled to have charges given which, without being misleading, correctly state the law of this case if they are supported by any evidence, however weak, insufficient or doubtful in credibility. The refusal of the Court to give such a charge when requested in writing, if the requested charge is nothing covered by the oral charge of the Court or other given charges, is reversible error.

Assignment of Errors Nos. Eight and Nine.

AUTHORITIES.

Bradberry v. State, 67 So. 2d 561;
Howser v. State, 117 Ala. 176, 23 So. 681;

Liner v. State, 124 Ala. 1, 27 So. 438;
Burnes v. State, 229 Ala. 68, 155 So. 561;
Gibson v. State, 89 Ala. 121, 3 So. 98;
Morris v. State, 39 So. 608;
Brooks v. State, 185 Ala. 1, 64 So. 295;
Johnson v. State, 257 Ala. 644, 60 So. 2d 818.

PROPOSITION VIII.

Confession.

The facts of this case show beyond a troubling doubt that the confession was not a voluntary one. Extrajudicial confessions are presumed to be involuntary, are prima facie inadmissible, and the burden is on the prosecution to establish that they are, in fact, voluntary. Those extrajudicial confessions of guilty made under the pressure of fear or hope in respect to the alleged crime should be excluded as evidence by the Court. If, after receiving testimony tending to show a confession, it is shown that the confession was procured by threats or promises sufficient to show its lack of voluntary character, the evidence of such confession should be excluded from the jury.

Assignment of Errors Nos. One, Two, Nine and Eleven.

AUTHORITIES.

Boner v. State, 55 Ala. 242;
Machen v. State, 16 Ala. App. 170, 76 So. 407;
Ward v. State, 50 Ala. 120;
Bob v. State, 32 Ala. 560;
Aaron v. State, 37 Ala. 106;
King v. State, 40 Ala. 314;
Lewis v. State, 220 Ala. 461, 125 So. 802;
Edwardson v. State, 255 Ala. 246, 51 So. 2d 233;
Wilson v. State, 84 Ala. 426, 4 So. 383;
Banks v. State, 84 Ala. 430, 4 So. 756;

Jackson v. State, 226 Ala. 72, 145 So. 756;
Palmore v. State, 244 Ala. 227, 12 So. 2d 854;
Lacey v. State, 58 Ala. 385;
Ballard v. State, 225 Ala. 202, 142 So. 668;
Lester v. State, 170 Ala. 36, 54 So. 175;
Anderson v. State, 104 Ala. 83, 16 So. 108;
Kelly v. State, 72 Ala. 244;
Rutland v. State, 31 Ala. App. 43, 11 So. 2d 768.

ARGUMENT.

I.

Where the defendant in a criminal prosecution shows to the reasonable satisfaction of the court that an impartial trial and unbiased verdict cannot be reasonably expected, his application for change of venue should be granted and the venue changed by the court.

Assignments of Errors, Nos. One, Two, Three, Nine.

AUTHORITIES.

Ex Parte Chase, 43 Ala. 303;
Godau v. State, 179 Ala. 27, 60 So. 908;
Baker v. State, 209 Ala. 142, 95 So. 267;
Title 15, Section 267, Alabama Code, 1940.

In the case at bar the defendant had been a police officer and the Birmingham News and the Birmingham Post Herald published the alleged crime in such a manner and to such an extent as to prejudice all citizens of Jefferson County, Alabama, of sufficient intelligence to sit as a juror, against the defendant. One of the said prejudicial articles is of record as Defendant's Exhibit "1" (Tr. page 5) said Exhibit "1" contains the headline in bold type "Fired Officer—Announcer Admit Robbery Attempt."

The lurid and sensational newspaper accounts and certain statements printed in the newspaper as to what Police Commissioner Eugene Conner said, what the assistant police chief, Ben F. Walker, said about the defendant and the announcer were so highly prejudicial and biased as to render it impossible for the defendant to receive a fair and impartial trial in Jefferson County, Alabama.

Some of the widespread statements (some twenty-odd articles) put in said newspapers, were not true, and said statements indelibly fixed in the minds of the citizens of

Jefferson County, Alabama, an opinion that the defendant was guilty as charged. The statement in the article in Defendant's Exhibit "1" that "The confession came only a few hours after Capt. Walker and Lt. Evans arrived in San Antonio, Texas, to question the pair," is false as shown by state's witness John J. Pettino, City detective for the City of San Antonio Police Department (Tr. page 35A). Witness John J. Pettino stated the alleged confession was taken on the 10th month and 27th day. He further stated that the tag number was received by his office on the 10th month and 25th day, 1953; but the confession was not taken until the 10th month and 27th day, 1953.

State witness, Lt. G. V. Evans, lieutenant detective, Birmingham Police Department, stated that the defendant did not make the alleged confession until after he (Evans) told the defendant that since he had no previous record and if the defendant would come back to Birmingham and plead guilty, he would probably be eligible to apply for probation (Tr. page 63). Witness Evans, also, before the defendant made the alleged confession (two days after Evans arrived in San Antonio, Texas), told the defendant that he would be entitled to a reasonable bond if he made a confession and returned to Birmingham voluntarily (Tr. page 64).

Since the original transcript of the evidence in this case did not include the evidence taken on the motion for change of venue and other motions, the defendant-appellant filed with the Court of Appeals of Alabama a petition for Writ of Certiorari to have a corrected transcript of proceedings prepared for the Court. This petition was granted and the transcript of the proceedings was forwarded under separate transcript entitled "Writ of Certiorari". Numerous exhibits were introduced on this motion for change of venue and on page six of the tran-

script the court reporter stated, "The documents offered by the movant were received in evidence, but were not identified as exhibits by the reporter. The documents, being newspaper articles and being impractical to copy into the record, the originals thereof will be forwarded, under proper certificates, by the clerk to the court for the use on submission of this cause." The transcript on the Writ of Certiorari is full of some twenty-odd newspaper articles which were displayed throughout the county in the two leading newspapers at that time. It seems impossible for a citizen of Jefferson County not to have been prejudiced by these lurid and sensational newspaper accounts concerning this robbery. By careful reading of this transcript one can clearly see that the defendant, by his witnesses and his exhibits, made a case and the necessity for a change of venue. The State's answer to all the witnesses and to all the exhibits introduced concerning the motion for a change of venue was this, "Mr. McCall, no, sir, I don't see any need to." in response to the question, "You want to put on any testimony?" by the Court.

The state did not make any attempt to put on any contradictory witnesses, nor did they have any affidavits or anything to show that the defendant's motion for a change of venue should not have well been taken. The judge, in his statement on page 22 of the Writ of Certiorari transcript stated as follows: "I grant you more publicity was given these cases than is true in a great many cases." There the judge was admitting himself the publicity was greater than any he had seen in a great while and that he knew same was bound to have had some effect on the defendant's position insofar as getting a fair trial. He later showed this by stating he was granting a continuance for the reasons, ". . . and, also, to let any publicity die down in the meantime that may have caused the defendant to feel he was being rushed to trial." The judge then granted a small

continuance from November 9th to December 7th. It seems clear to the appellant that this judge knew the defendant could not receive a fair trial at the time because of the publicity. As a result he granted a small thirty-day delay to allow publicity to die down. This, of course, was impossible as shown by the fact that the jury was out only five minutes and probably from the very beginning did not give the defendant a chance. It is a terrible thing to allow human rights of a defendant—granting he was a police officer—to have been trampled upon and denied his rights as is clearly shown by the actions of the trial judge in this case. His continuous abuses of discretion and his overruling for a change of venue point out that the appellant probably did not have a chance from the very beginning.

When this Honorable Court looks over the twenty-odd exhibits taken from the newspaper clippings, it is submitted that this Court will clearly see an unprecedented amount of publicity, all unfavorable, was given the defendant in this case which caused him to be denied a fair and impartial trial.

II.

The refusal of an application for a change of venue in a criminal case may, after final judgment, be reviewed and revised on appeal, and the appellate court shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on the application.

Assignment of Errors Nos. One, Two, Three, and Nine.

It is axiomatic in our system of justice that any accused, however great may be the offense charged against him, is entitled to a fair and impartial trial. This, of

course, can only be secured in a forum devoid of bias, prejudice and matters calculated to inflame the minds of those who sit in judgment on the accused. It is recognized by legislature and the framers of the Constitutions that there may be occasions when an individual charged with crime cannot secure a fair and impartial trial in the customary form, because of the bias, prejudice or inflammatory circumstances. Anticipating this, and pursuant to a constitutional authorization, the legislature of the State of Alabama has always provided by Statute for a change of venture for defendants who find themselves in this unfortunate circumstance. The present Statute relating to this matter in Alabama is to be found in Title 15, Section 267, Alabama Code 1940, and states as follows:

> "Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reason why he cannot have a fair and impartial trial in the county in which the indictment is found; which application must be sworn to by him and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the Supreme Court or Court of Appeals shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on said application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in Court."

The application for change of venue contemplated by the Statute was duly filed by appellant in this case. On his oath therein, the defendant states that the citizens of Jefferson County have been prejudiced against the defendant

on account of the wide publicity given his alleged offense and that newspapers circulated throughout the county broadly proclaimed the fact that a confession had been given by the defendant. It points out that the defendant was indicted two days after the arrest, and that his case was first set for trial only seven days after the indictment. He avers that for the reason stated in the application, the minds of the citizens and prospective jurors of Jefferson County are so inflamed against him that it would be impossible for him to secure a fair and impartial trial within the county.

It is recognized that the defendant who moved for a change of venue has the burden of reasonably satisfying the Court that he cannot reasonably expect a fair and impartial trial. It is further recognized that the trial judge enjoys a wide discretion in ruling on such applications, which will not be lightly overturned, but the Statute quoted above clearly provides that no presumptions in favor of the ruling of the trial judge on the application will be indulged, and decisions consonant with this Statute and its predecessors give it full effect. **Maund v. State, 254 Ala. 452, 48 So. 2d 553; Godau v. State, 179 Ala. 27, 60 So. 903; Ex Parte Chase, 43 Ala. 303; Seams v. State, 84 Ala. 410, 4 So. 521.**

It is observed that in most cases where the application for change of venue has been denied, and the denial thereof upheld on appeal, the trial judge has at least had before him a contradiction by the solicitor of the matters averred in the affidavit. In many of the cases contrary affidavits have been filed by the prosecution, and in a great number of cases the overwhelming preponderance of the evidence submitted to the trial judge, all on affidavits, was to the effect that the defendant could secure a fair trial in the county where indicted. Such is not the case here. With nothing contradicting or tending to disprove the

positive averments of the affidavits, the Court chose to overrule the application. That the important right to a fair and impartial trial was not intended to be casually set aside on application for change of venue was forcibly stated by the Supreme Court in **Ex Parte Chase, 43 Ala. 303.** The Court stated at page 311:

"There is no other marked purpose that can be secured by a change of venue, save the opportunity it affords for a trial by an impartial jury. This is the sole object of the removal of the trial to another county. All the other requisitions for a fair and impartial trial may be held in any county or district of the State, but this one of an impartial jury cannot, as the history of such trials and the policy of the law, which authorizes the removal, everywhere attest. If the removal were a necessity, for the sake of justice, it would never be granted at all. The Constitution gives the right of trial by an impartial jury, and the legislative enactment directs how this right shall be enforced. In all cases, wherein an impartial jury cannot be procured in the county where the indictment is found, this right must fail, unless a removal of the trial is allowed. If the main right—the right to have a trial by an impartial jury—is preemptory, as it certainly is, then the means by which it is to be enforced and defended are also premptory; otherwise the main right might fail, for want of the proper means to sustain it. No wise construction aims at such result. No wise legislation will permit it. The legislative enactment then must be construed so as to support and defend the constitutional grant. To do this, the right to a change of venue, in a proper case, must be preemptory.

"To place a great right like this upon judicial discretion, it is sometimes a mockery of justice, it is at least to disregard the history of judicial decisions.

> If all judges, or, indeed, if any judge, were perfect, then the people might safely rely upon judicial discretion for a perfect administration of the law. But, unfortunately, it is but too well known that such an assumption is not true, and that the wisest and the best commit grave errors and make mistakes."

The Court in Chase case goes on to state that it is imperative on the Court that the removal order be entered in the proper case, and the judicial discretion allowed is not an absolute discretion to grant or refuse the application, the Court further states, at page 311, that it is the opinion of the Court that, upon an application for change of venue, affidavits should be heard on both sides.

That the granting of the application may cause some delay is of small moment, when the more important consideration of the constitutional rights of the accused is placed in proper focus. As stated by the Supreme Court in **Seams v. State, 84 Ala. 410, 4 So. 521:**

> "It (the law) accords a fair trial by a fair and unbiased jury, to the most wicked violator of the law, whose feet have been swift to shed blood, equally with him who had justifiably stricken in the defense of himself, his family, or his home. It is of small importance, in this connection, that the execution of justice by a great State should be delayed for a season, compared with the danger of violating those sacred principles and safeguards of liberty by which that justice is to be lawfully administered."

The Appellate Court need not speculate on whether the prejudice against appellant worked his conviction, or whether atmosphere of bias generated against him insidiously infiltrated the judicial chamber and caused the able judge to innocently impose upon appellant a severer penalty than he would have under the facts, absent the preju-

dice. The only question is whether the application should have been granted when presented without contradiction, under a constitutional guarantee and a statute designed for the protection of the accused.

III.

If a defendant charged with a crime requiring a specific intent is shown to have been so intoxicated that he was incapable of entertaining that intent, he cannot be convicted of the crime—not because we countenance drunkenness as a mitigating circumstance, but because he did not commit the crime charged. See authorities, supra (assignment of errors 1, 5, 9).

Our fifth assignment of error points out that the Court committed reversible error in refusing, separately and severally, to give defendant's written requested charges which are quoted, supra, under our assignment of error number five. Defendant's requested written charge number seven is as follows: "The presumption in this case is that the defendant is innocent until the State has proven beyond all reasonable doubt that he is guilty; and if the jury have a reasonable doubt growing out of all the evidence, as to whether he was sufficiently sober to form the specific intent to rob, then the jury cannot find the defendant guilty of an assault with intent to rob." Refused—signed King.

In the case of Ray v. State, supra, Mr. Chief Justice Livingston rendered the opinion and in part said, "Voluntary drunkenness neither excuses nor appiates crime. But in murder cases evidence of drunkenness to such degree that the accused is incapable of rational action and hence incapable of forming a specific intent essential to a malicious killing may reduce the killing to manslaughter, or may negative the premeditation and deliberation essential to manslaughter, or may negative the premeditation and

deliberation essential to murder in the first degree, or reduce the crime to murder in the second degree. **Ivory v. State, 237 Ala. 344, 186 So. 460; King v. State, 90 Ala. 612, 616, 8 So. 856.**

In that case the question of appellant's drunkenness and his being capable of entertaining intent is raised for the first time in the Circuit Court on a motion for a new trial. In the instant case the defendant by written charges raised the point and said written charges were refused by the judge and no part of the oral charge covered specifically the law pronounced in our Proposition III and in the authorities cited thereunder.

Defendant-appellant's written charge number nine, which was refused by the court, definitely should have been given since the oral charge and other requested charges did not adequately cover the question of drunkenness as a defense. Defendant-appellant's requested written charge number nine is as follows: "If the jury believes from the evidence that at the time when the defendant entered the filling station he was in such a condition from drink as not to form a specific intent to rob, then the defendant may be acquitted." Refused, King, judge. In support of our contention in this matter we rely upon all of the authorities cited under our Proposition V.

The defendant's refused written charges numbered 12, 13, 16, 21, 23, 30, 36, 54, 60, 64, 67, 75, 76, 80, 82, 84 and 96, separately and severally, deal with the question of specific intent. The above numbered refused charges were not covered by the Court's oral charge or by given written charges. We earnestly insist that our Assignment of Error number five calls for a reversal in this case.

As pointed out in our assignment of error number five the court committed reversible error in refusing to give the following written charges requested by the defendant-

appellant: 8, 17, 27, 33, 48, 49, 50, 52, 53, 55, 57, 58, 59, 62, 63, 65, 72, 78, 79, 80, 81, 89, and 92.

Said charges, separately and severally, are correct statements of the law, applicable to the evidence in the case at bar. Said charges, separately and severally, are not misleading and said charges, separately and severally, were not covered by the court in his oral charge to the jury nor in any of the written charges given to the jury.

We submit, therefore, and respectfully insist that because of the error of the court as pointed out in our Assignment of Error number five, the case at bar should be reversed.

IV.

An instruction on insanity that defendant must satisfy the jury by a preponderance of testimony is erroneous in requiring more than the "reasonable satisfaction" prescribed by statute.

Assignment of Errors, Nos. One, Two, Four and Nine.

Our assignment of error number four points out that the Court committed reversible error when he orally charged the jury that when insanity is set up as a defense in a criminal case, it must be established, to the satisfaction of the jury, by a preponderance of the evidence, and a reasonable doubt of the defendant's insanity, raised by all the evidence, does not authorize an acquittal.

It would extend this brief to such an extent as the reading would become extremely laborious if all the authorities cited under our proposition of law were quoted herein. The authorities cited under our proposition IV consists of ten Alabama Supreme Court cases. Without exception, all these point out that an instruction on in-

sanity requiring the defendant to satisfy the jury with a preponderance of evidence is erroneous and calls for reversal. The charge of the court on an instruction requiring the defendant to satisfy the jury by a preponderance of testimony goes far beyond the statute which requires only that the defendant must satisfy the jury to its reasonable satisfaction. This is brought out in **Mental Disorder as a Criminal Defense**, Weihafen, 1954, page 242.

Section 422, Title 15, Code of Alabama, 1940, reads as follows: 422 (4572) (7175) (4938) Presumption in favor of sanity; burden and measure of proof of insanity. Every person over fourteen years of age charged with crime is presumed to be responsible for his acts, and that the burden for proving he is irresponsible is cast upon the accused. The defense of insanity in all criminal prosecutions shall be clearly proved to the reasonable satisfaction of the jury.

You will observe from said section that the last sentence reads as follows: "The defense of insanity in all criminal prosecutions shall be clearly proved to the reasonable satisfaction of the jury".

When the Court in its oral charge told the jury that "defendant must satisfy the jury by a preponderance of testimony" such instruction was contrary to Section 422, Title 15, Code of Alabama, 1940.

The measure of proof placed upon the defendant in the case at bar was a greater burden to the defendant than is required by the statute.

Defendant duly and legally objected to that portion of the Court's oral charge which is quoted in our Assignment of Error number IV. The court overruled defendant's objection to said oral charge and the defendant duly and legally excepted (Tr. p. 154).

We submit, therefore, under our Assignment of Error number IV the Court committed reversible error to the hurt and prejudice of the defendant-appellant.

V.

Motion for continuance is addressed to the sound discretion of the trial court, but the judgment of the trial court will be disturbed on appeal where there is an abuse of such discretion.

Assignment of Errors Nos. One, Two, Six, Nine and Ten.

In the case at bar the trial court abused its discretion as shown on pages 1A and 2A of the transcript by the following proceedings:

Mr. McCall: Judge, I want the record to show that when the case was called for trial, Mr. Odum announced ready, or the defendant's attorney announced ready for trial.

The Court: Let's get the cards, gentlemen.

Mr. Odum: Let the record show further, that the defendant is offering to put forward to the Court a written and sworn motion for continuance, and therein he sets out several grounds, and that the jury is not present.

Mr. McCall: Won't you, Mr. Odum, say that you announced ready for a trial a while ago?

Mr. Odum: I will say that——

Mr. McCall: Didn't you announce ready for trial?

Mr. Odum: I stated we would be ready.

The Court: Both sides announced ready and, therefore, I won't hear any motion for continuance unless something has come up since the defendant—since both sides announced ready for trial. It would materially alter the situation (Tr. page 1A).

Mr. Odum: The defendant excepts to the Court's motion——

The Court: All right.

Mr. Odum: ——ruling, and I am going to hand the Solicitor a copy of my——

The Court: That doesn't go in the record; that motion doesn't go in the record.

Mr. Odum: You mean this motion, Judge, doesn't go in the record?

The Court: No, it doesn't go in the record.

Mr. McCall: We have already announced ready in the case.

Mr. Odum: We except to the Court's refusal to let us file this motion for continuance.

The Court: No, not after you announced ready—no, I don't want to mess up my record with a lot of stuff here just for the record; I just don't want to do that.

Mr. Odum: We except to the Court's ruling.

The Court: All right, come on. No, that doesn't go in the record at all.

Mr. Odum: Judge, you mean what has gone on here doesn't go in the record?

The Court: He has already put what you have said in, but—that is a part of the record, the written record, but no written motion goes in there after you announced ready for trial, and we are fixing to draw the cards at this time so that comes too late, as I stated, unless something has come up since the defendant announced ready that would make it necessary to do that——

Mr. Odum: May it please the Court, I will withdraw that and offer to make an oral motion, if you like, sir

The Court: No, you are already through.

Mr. Odum: We except (Tr. page 2A).

The document offered to be filed on behalf of the defendant, but rejected by the court, on objection of the State as too late, was in words and figures as shown on pages 2A, 3A and 4A.

The proceedings showing abuse of discretion by the trial court to such an extent as to call for a reversal, in the case

at bar, appears on transcript pages 4A, 5A, 6A and 7A as follows:

The Court: Let us try the case, no, there have been enough shenanigans in this case already.

Mr. Odum: We except to the Court's ex mero motu statement that there have been enough shenanigans in this case.

The Court: All right.

Mr. Odum: Judge, may we file our plea then?

The Court: I am drawing the cards now. I guess we had better get about a dozen (Tr. page 411).

(Whereupon the court drew from the jury box in open court the venire for the trial of this cause, consisting of some number in excess of thirty.)

(Whereupon, after the first twelve names drawn as jurors had entered the jury box, the following occurred:)

Mr. Odum: Judge, before the jury gets here, I would like to offer this motion for continuance again, sir.

The Court: I have overruled your motion for continuance; it doesn't go in the record.

Mr. Odum: I would like to offer as Exhibit "A"—as Exhibit "A" to offer——

The Court: No, I am not accepting any motion for continuance, not after the plea of not guilty, because it comes too late. (Plea of not guilty had not been made.)

Mr. Odum: Judge, it is necessary to preserve our rights, and then file the motion later.

The Court: No, you filed your motion ahead of time, so any motion for continuance would come too late.

Mr. Odum: Could I read the motion for the record?

The Court: No.

Mr. Odum: We except.

The Court: I am not going to allow that. The case is ready for trial now, Mr. Odum.

VI.

In the trial of a criminal case, the law imposes upon the court the mandatory duty of instructing the jury orally as to the different and distinguishing elements of the offenses charged. An improper charge concerning the elements of the offenses or the failure to properly define these elements for the jury, constitutes reversible error.

Assignment of Errors Nos. Seven, Eight, and Nine.

The Court erred in that part of its oral charge to the jury in which he stated as follows: "Now, gentlemen, malice is an essential element of the offense of assault with intent to rob, but neither malice nor intent are elements of the two lesser offenses of assault and battery or an attempt to commit an assault with intent to rob. But you don't need to be concerned about those lesser offenses, gentlemen, you consider those, because they all carry the same punishment, so—I mean it wouldn't matter, as far as the defendant's situation is concerned, because they all carry exactly the same punishment."

It is submitted that the law imposes upon the trial court the mandatory duty of instructing the jury orally as to the different and distinguishing elements of the offense charged. An improper charge concerning the elements of the offense, on the failure to properly define these elements for the jury, constitutes reversible error on exception made. In **Gilbert v. State, 32 Ala. 200, 23 So. 2d 22,** this Court, quoting from **Mitchell v. State, 210 Ala. 457, 98 So. 285,** said:

> "It was the duty of the court—mandatory duty of the court—to instruct the jury orally as to the different and distinguishing elements of the offense. Without such instructions from the Court, the jury could not intelligently comply with their statutory duty. This right of the defendant to have the jury so charged by the court was valuable. The duty resting on the court to so charge the jury is imperative. The error

committed by the court in refusing to do so is manifest."

The essential elements of robbery in Alabama are felonious intent, the use of force, and a putting in fear as the means of effectuating the intent. **Thompson v. State, 24 Ala. App. 300, 134 So. 679.** Felonious intent required in a larcenous intent, which must exist at the time of the taking. **Kennedy v. State, 208 Ala. 66, 93 So. 822; Henderson v. State, 172 Ala. 415, 55 So. 816.** This court and the Supreme Court have not included the term "malice" as an essential element of robbery.

We do not know if the learned trial Judge intended the terms "malice" and "intent" to mean the same thing. Presumably he did not, taking the part of the oral charge quoted above into consideration. However, the only definition the Court attempted to give to "intent" was to state that the intent required was "intent to rob." It is further noted that the court does not define robbery anywhere, and attempts to characterize the intent required by using the undefined term "rob." Malice, which the court apparently treats as something different from intent, is nowhere defined. We contend that malice is not an element of the offense charged.

Lest it be maintained that malice is an element of the offense charged, or, though not an element, that the insertion of malice as an element was not prejudicial to the defendant because it required an additional finding by the jury to return a guilty verdict, we proceed to another point. First, though malice in lay usage may mean ill will against a person, in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. **Boulden v. State, 102 Ala. 78, 15 So. 31.** If malice is an element of the offense charged, certainly the defendant is entitled to have that element defined in the Court's charge. This is a technical term, particularly likely to be misunderstood when it is considered that it is in everyday usage with a

different meaning than the legal meaning. A juror is much more likely to be confused if he is not given a definition of malice than if the court fails to define self-defense for him, for example. Yet it has been held that requested charges which use the term "self-defense" are incorrect for failing to define the term, and are properly refused. This Court stated that in **Garth v. State, 8 Ala. App. 23, 62 So. 383:**

> "Each of the other charges—is faulty in referring a question of law to the jury, in that they submit to the jury a finding on self-defense without defining the constituent element of self-defense."

In Chappell v. State, 15 Ala. App. 227, 73 So. 134, this Court stated that the effect of such a charge is to refer "a question of law to the jury." If this is true as to a failure to define self-defense, a fortiori it is true of a failure to define the malice of intent. It is not invasive of the province of the jury, rather, it assigns the jury a function for which the jury was never intended, that is, to apply its own definition to the undefined elements of an offense, as charged to them by the Court.

Secondly, assuming that malice is not an element of the offense, the Court, in the above quotation from the oral charge, advised the jury that this undefined term, malice, might be presumed from the use of a deadly weapon, and that the burden was thereby cast upon the defendant to repel the presumption unless the evidence which showed the offense showed, also, that it was done without malice. Then, with malice not an element, the effect of this charge is to tell the jury that appellant possessed malice, or that there was evidence placing the burden on him to show that he did not possess it. Malice, of course, is still undefined. The net effect of such charge is to create or strengthen the conviction of guilty in the minds of the jury, in that there is evidence from which malice can be found. If malice is not an element, the appellant is entitled to be free from that millstone about his neck. If it is an

element, he is entitled to have it properly defined and submitted to the jury. A proper exception was reserved by defense counsel, and no correction made by the Court. It is strenuously urged that this action constituted reversible error.

Assuming that all the other points brought forth and argued by the appellant have no weight and are not even considered by this Court under Assignment of Error Number VII this Honorable Court could reverse the trial judge's actions in that he gave a very faulty and misleading charge. Looking at this charge we see that the judge said, "You don't need to be concerned about those three lessor offenses, gentlemen, you consider those because they all carry the same punishment."

There the jury was given the impression that it was no need to consider the lessor offenses in this offense because we want you to stick the man for only the big offense. It is unforgivable that a trial judge would confuse a charge the way this one was confused. Certainly this charge mislead the jury and this charge alone could be the cause for a reversal.

VII.

The defendant in a criminal case is entitled to have charges given, which without being misleading, correctly state the law of his case, if they are supported by any evidence, however weak, insufficient, or doubtful in credibility. The refusal of the court to give such a charge when requested in writing, if the requested charge is nothing covered by the oral charge of the court or other given charges, is reversible error.

Assignment of Error, Nos. Eight and Nine.

Our Assignment of Error Number Eight points out that the court committed reversible error in refusing the de-

fendant-appellant written requested charges which said refused written charges were quoted, separately and severally, under our Assignment of Error Number Five in our original brief.

We submit and earnestly insist that said refused written charges, separately and severally, are not misleading; that said charges, separately and severally, correctly state the law in the case at bar; that they are not all supported by evidence and that they are not all covered in the court's oral charge nor in the court's given written charges.

VIII.

Extrajudicial confessions are presumed to be involuntary, are prima facie inadmissible, and the burden is on the prosecution to establish that they are, in fact, voluntary. Those extrajudicial confessions of guilt made under the pressure of fear or hope in respect to the alleged crime should be excluded as evidence by the court. If, after receiving testimony tending to show a confession, it is shown that the confession was procured by threats or promises sufficient to show its lack of voluntary character, the evidence of such confession should be excluded from the jury.

Assignment of Error, Nos. One, Two, Nine and Eleven.

Many cases could be cited to emphasize that the Supreme Court and this Court have not regarded lightly the proposition that the burden is on the prosecution to establish that extrajudicial confessions of guilt, which are prima facie involuntary, are, in fact, voluntary. It is felt that a few examples will suffice. In **Lacey v. State, 58 Ala. 385,** testimony of the prosecutor in a burglary case where a chair was stolen from him, was to the effect that he met the defendant and stated to him, "You had better return the chair," and defendant replied that he would. The

prosecutor further testified that no inducement by way of threat or promise was held out to defendant, but the Court stated, "The law cannot measure the degree of influence exerted upon the prisoner's mind, by inducement or threat made. The confession, to be receivable in evidence, must be purely voluntary."

The full discussion of our law relating to extrajudicial confessions found in Edwardson v. State, 255 Ala. 246, 51 So. 2d 233, demonstrates the care that our Appellate Courts use in determining whether such a confession, is, in fact, voluntary.

In **Lewis v. State, 220 Ala. 461, 125 So. 802,** the prosecution put in evidence confessions purportedly made by the defendant, after establishing a proper predicate therefor. When defense testimony subsequently indicated that the confessions were not voluntary, the Supreme Court, in its opinion, made this statement:

> "If after receiving testimony going to show a confession, it is shown that the confession was procured by threats or promises sufficient to show its lack of voluntary character, the evidence of such confession should be excluded from the jury."

In **Bonner v. State, 55 Ala. 243,** the Supreme Court stated:

> "In that jealous care which the law exercises at all times in protection of life and liberty; in the tender regard it pays to human weakness and frailty, it is laid down as one of the cardinal rules of evidence, that confessions of guilt, shall not be received against a prisoner, until it is first affirmatively shown that they were made voluntarily. They are prima facie inadmissible onus rests on the prosecution to repel the imputation of undue influence. Any inducement of

profit, benefit or melioration held out; any threat of violence, injury, increased rigor of confinement, or any other menace which can inspire alarm, dread, or the slightest fear, is enough to exclude the confession as not voluntary. The law cannot measure the strength of human fortitude or will to resist importunity, persuasion, or proffered alleviations on the one hand, or threats, no matter how slight, on the other. Hence, to justify their admission, confessions must be voluntary in fact.

"And the question, whether the confessions were voluntarily made or not, it is one of law to be decided by the Court, and not one for fact for decision by the jury. When such testimony is offered preliminary proof should first be made, showing the circumstances under which the alleged confession was made; and when desired by either party, the Court, before admitting the evidence, should hear the testimony offered on each side, and from it determine whether the testimony established the fact that the confession was voluntarily made. And if, after receiving such testimony, it is afterwards shown that the confession was procured by threats or promises, as above defined, the court should exclude from the jury all evidence of such confessions. **Bob v. State, 32 Ala. 560; Aaron v. State, 37 Ala. 106; King v. State, 40 Ala. 314; 1 Greenl. Ev., Section 219.** So, if, after hearing all the evidence, the mind of the Court entertain a reasonable doubt whether or not the testimony was or was not voluntary, that doubt ought to be received in favor of the accused, and the testimony excluded."

In Machen v. State, 16 Ala. App. 170, 76 So. 407, where the testimony of a witness who related the confession was to the effect that he had told the accused that it would be better for him to tell the whole thing, and that the property purportedly stolen had been found pretty close to

him, and that he would help the accused make his bond or something like that, this court held that the confession was inadmissible. The opinion states:

> "Before they are receivable as evidence, it must be shown that they were made freely and voluntarily, without the application of hope or fear, without extraneous pressure in either direction from other persons. Made in the presence of certain circumstances, or under the pressure of calamity to friends, or ease or freedom, the man is so easily seduced, as different agitations may prevail, to speak falsehood or truth, the law presumes against their admissibility . . . presumes that they are not a basis upon which a jury can safely render a verdict. Whether confessions or admission are freely and voluntarily made is a matter of law to be decided by the Courts; and if, after a consideration of the condition of the accused, and the circumstances under which they were made, there is reasonable doubt of their freedom and voluntariness, the doubt must be resolved against their admissibility."

The law guards so strongly against the effect of inducements or threats on the accused who makes a confession that his confession will not be admitted into evidence following inducements or threats made to him in the past unless it is shown that the possible, harmful effect of the threat or inducement had been removed prior to making the confession. This has always been the law in this State, and was stated by the Court as long ago as in Ward v. State, 50 Ala. 120, where the Supreme Court stated:

> "If the confessions had been made of the bailiff, immediately on his statement to the accused that if he would confess the offense and tell where the bacon was, he should be turned loose, it would scarcely be contended that they should be springing from the

hope of release from imprisonment and from criminal prosecution, promised by the declaration of the bailiff. We cannot say that the hope thus inspired was not operating on him when he made the confession on the next day and during the continuance of the arrest. So far as the record disclosed, nothing occurred to remove or diminish it."

We are aware that the fact that a confession is made to officials who have the accused in their custody does not necessarily defeat its admissibility. It is proper, however, to consider that when representations or inducements are made by such persons to the accused, their apparent authority to accomplish the thing promised is much greater than would be that of a private individual making the same representation. Under these circumstances, the fact that on at least two occasions the appellant had denied his guilt, and made his confession only after representations with regard to additional charges, bond and probation were made to him, as set forth above, becomes increasingly important.

CONCLUSION.

It is apparent from the foregoing that the Alabama Court of Appeals erred in upholding the Circuit Court's decision in which the petitioner was convicted and sentenced to a lengthy term of fifteen years by the trial judge. Such a term was too harsh for the offense. The trial court committed many errors and the Court of Appeals erred in sustaining the various rulings which we have complained about in this petition and brief. It is respectfully prayed that the judgment of the Alabama Court of Appeals be reversed with directions for the case to be retried or that in the alternative a writ of certiorari be issued to the Court of Appeals of Alabama, to the end that this case may be reviewed and determined by this

Court, that the judgment of the Alabama Court of Appeals be reversed and that the petitioner be granted such other and further relief as may seem fit and proper.

Respectfully submitted,

GEORGE TRAWICK,
Attorney for Petitioner.

J. EDMUND ODUM,
JOHN T. BATTEN,
Of Counsel.

APPENDIX.

OPINION OF THE COURT OF APPEALS OF ALABAMA, RENDERED DECEMBER 4, 1956, BEFORE CATES, JUDGE.

Paul M. Beddow was convicted of assault with intent to rob, sentenced to fifteen years imprisonment, and has appealed.

This is a companion case to that of **Hunter v. State, Ala. App., 83 So. 2d 737,** and the facts stated in the Hunter case can be adopted herein with three exceptions, viz.: First, the testimony of Hunter as set forth in 83 So. 2d at page 738, supra, was not in Beddow's case; second, Beddow, having pleaded not guilty, and not guilty by reason of insanity, brought in proof from which the jury might have found him not guilty on the latter plea, and, third, the testimony of Lt. Lance, 83 So. 2d at page 742, was not given here.

(1) Also there was certified to us a transcript of the hearing held on Beddow's motion for a change of venue, which was based on prejudice against him because of newspaper articles. Beddow was a Birmingham police officer at the time of the alleged offense and complained that the press was giving undue notice to his arrest. He further claimed he was being given too speedy a trial in the circumstances. His motion was overruled and an exception granted.

We have before us the testimony of six witnesses, exhibits and a record statement by the court below. The exhibits consist of clippings from the Birmingham newspapers narrating the charges against, and arrest of, the defendant and Hunter. We note the testimony that at that time (November 9, 1953) Jefferson County had a popula-

tion of 500,000 or upwards, and the judge stated that there were over 40,000 men whose names were in the jury box. **See 56 Am. Jur., Venue, Section 70, No. 11.**

We find nothing in the clippings of an inflammatory character. The reports were in narrative form and purported to be interviews with the police officials. Newspaper articles, without more, are not evidence here; their effect must be shown. The testimony of the six witnesses did not meet the burden of persuasion. Moreover, the trial court, though denying the change of venue, passed the case for four weeks.

Altogether, considering the size of the jury box, the four-week continuance, and the defendant's right through putting the veniremen of the voir dire to challenge for cause anyone who admitted being biased, we, in accordance with second sentence of Section 267, Title 15, Code 1940, adjudge the motion for a change of venue was properly overruled. **'atton v. State, 246 Ala. 639, 21 So. 844.**

As to Beddow's confession, all that was said in Hunter case applied here.

(2) Appellant assigns as error an exception to the Court's oral charge. In instructing the jury the court referred to "malice" and "intent" as ingredients of the crime charged, then, mentioning the included lesser offenses of simple assault and assault and battery and attempt, said, ". . . but you don't need to be concerned about those three lesser offenses, gentlemen, you consider those, because they all carry the same punishment, so—I mean it wouldn't matter as far as the defendant's situation is concerned, because they all carry exactly the same punishment."

The defendant's exception to this was stated to be to the portion, "You don't need to be too concerned about the lesser offenses, because they include the same punish-

ment." Whereupon, the judge clarified that he meant that since the punishment for the lesser offenses was of an identical range (Title 14, Section 33, and Title 15, Section 327, Code 1940) as far as punishment was concerned, "it would amount to the same thing."

The court proceeded to assemble and read the written charges. Appellant's counsel then asked for a further charge that the jury might take the written charges with them into the jury room. No other exceptions to the oral charge appear. The jury is then shown to have retired.

We consider that the exception as to the lesser charge language (even had it been meritorious) was waived under the doctrine set forth in McFarling v. State, 35 Ala. App. 191, 45 So. 2d 322. No other or further exceptions having been assigned to the oral charge, error cannot be specified for any of its defects or omissions. **Montgomery v. State, 17 Ala. App. 469, 86 So. 132**, certiorari denied **204 Ala. 389, 85 So. 785.**

(3) Objection was made to the solicitor's question, "Is that the pistol that he said the man had?" The objection was made after the witness had already answered and therefore was too late.

(4) An assignment of error is grounded on the trial court's denial of a motion for a mistrial because a state witness, after testifying, returned to the witness room and engaged in conversation with other witnesses, telling them what he had testified to. The offending witness' testimony was unrelated to the testimony of those who followed him on the stand. Hence, since we see no harm done, we agree with the trial court that the motion was due to be denied.

(5) The sequestration of witnesses under "The Rule" while rarely to be withheld upon request, is nevertheless discretionary with the trial court. And, where, for in-

stance, a witness has remained in the court room in violation of the rule, the trial court's decision as to his testifying or not is not open to review. **Wilson v. State, 52 Ala. 299; Teague v. State, 245 Ala. 339, 16 So. 877.** Moreover, the efficacy of sequestration which can only occur during the trial—is probably overrated. The law has moved from oath-taking to cross-examination in its search from the truth.

(6) Intent, as impaired by either intoxication or insanity, was a question for the jury. No question under the last sentence of Section 422, Title 15, Code 1940, is presented to us, since there is no exception or request which could have raised the applicability of **James v. State, 167 Ala. 14, 52 So. 840.**

(7) Beddow challenged for cause two members of the venire because they were policemen. This contention is answered by reason (c), assigned by Judge Simpson in **Brackin v. State, 31 Ala. App. 228, 231, 14 So. 2d 383, 385.**

As to any prejudice because of the appellant's being accused as a "turncoat" policeman, voir dire examination was available as a sufficient device to ascertain and eliminate any potential jurymen who might have entertained an abiding bias against Beddow.

We have reviewed all of the defendant's refused charges and conclude they were properly refused either as being otherwise treated or as incorrect.

Consideration having been given agreeably with the mandate of Title 15, 389, Code 1940, it is concluded that the judgment is due to be

Affirmed.

Court of Appeals of Alabama,
Sixth Division.

Paul M. Beddow,
Appellant,

vs.

State of Alabama,
Appellee.

To: The Honorable Mr. Justice Robert Harwood of the Court of Appeals of Alabama.

MOTION TO STAY ISSUANCE OF MANDATE OR EXECUTION PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Now comes the appellant, Paul M. Beddow, through his attorney of record, J. Edmund Odum, and respectfully prays that this Honorable Court grant an order staying the mandate or execution and inforcement of the judgment of the Court of Appeals and the Supreme Court of Alabama denying the petition for Writ of Certiorari to the Court of Appeals for a period of ninety days in order for the appellant to apply to the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Supreme Court of Alabama and the Court of Appeals of Alabama and the appellant further prays that a like mandate be ordered to issue successively until a final determination of said controversy by the Supreme Court of the United States.

Appellant respectfully presents this his motion for an order staying the mandate or judgment of affirmance, an execution and enforcement of the judgment of the Supreme Court of Alabama and the Court of Appeals of Alabama which includes the original affirmance of the opinion as well as the denial of the Application for rehearing in the Court of Appeals of Alabama alongwith the denial

of the Writ of Certiorari to the Court of Appeals of Alabama in the Supreme Court of Alabama and the final denial of the application for rehearing on said denial of the Writ of Certiorari. Under the provisions of Section 2101 of Title 28, of the United States Code, to enable the said appellant to apply for and endeavor to obtain a Writ of Certiorari from the Supreme Court of the United States.

Your appellant further respectfully shows unto this Honorable Court that the grounds for a stay of issuance of mandate or execution of judgment of affirmance for ninety days is based upon the following:

1. The record in the above styled case is voluminous and it will take a considerable length of time to prepare this record properly for presentation to the Supreme Court of the United States.

Wherefore, the appellant prays that this Honorable Court will issue the stay of a mandate or judgment of affirmance in the above entitled cause for a period of ninety days and further prays that like mandates be ordered to issue successively until final determination of said controversy by the Supreme Court of the United States.

(s) J. Edmund Odum.

State of Alabama,
Jefferson County.

J. Edmund Odum, being on oath first duly sworn, deposes and says that he is the attorney of record for the appellant, that he has read and understands the contents of the above and foregoing motion and states that the matter herein contained be true and correct.

(s) J. Edmund Odum.

Sworn to and subscribed before me this the 28 day of June, 1957.

(s) John T. Batten.

This motion is presented to this Honorable Court in good faith and not for delay and is believed to be meritorious. This motion is presented to this Court also on grounds that the appellant may have time to appeal the past determination in the Supreme Court and the Court of Appeals of Alabama to the Supreme Court of the United States.

(s) J. Edmund Odum.

Certificate of Service.

I hereby certify that I have on this the 28 day of June, 1957, mailed postage prepaid a copy of the above motion to Honorable John Patterson, Attorney General of the State of Alabama, and to Mr. Charles Bricken, Clerk of the Court of Appeals of Alabama.

This the 28 day of June, 1957.

(s) J. Edmund Odum.

Certificate of Service.

I hereby certify that I have on this the .... day of ....., 1957, mailed postage prepaid a copy of the above and foregoing petition for Writ of Certiorari to the Court of Appeals of Alabama and Brief in support thereof to the Honorable John Patterson, Attorney General of the State of Alabama, which said brief and petition was placed in the United States government mail postage prepaid in care of Mr. Patterson at the Judicial Building, Montgomery, Alabama.

John T. Batten.

Sworn to and subscribed before me this the .... day of ....., 1957.

Thomas L. Smith, Jr.,
Notary Public.

(Seal)

Office - Supreme Court, U.S.
FILED
JAN 13 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 657

PAUL M. BEDDOW,
Petitioner,

vs.

STATE OF ALABAMA
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN PATTERSON
Attorney General of Alabama

EDMON L. RINEHART
Assistant Attorney General of Alabama

COUNSEL FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

OPINION OF THE COURT BELOW

The opinion below entered upon December 4, 1956, and adhered to upon rehearing, is printed in an appendix to the petition for certiorari and petitioner's brief at page 51.

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Supreme Court of Alabama, rendered December 4, 1956, under the provisions of Title 28, Section 1257 (3), United States Code, Judiciary and Judicial Procedure. (See petitioner's brief, page 2.)

QUESTIONS PRESENTED

I.

Is any federal question presented for review by the decisions of the Alabama courts in this case?

II.

Did the introduction in evidence of two confessions made while petitioner was detained by the San Antonio police, when he was questioned intermittently without threats, promises or abuse, deny the petitioner due process of law guaranteed by the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Petitioner, Paul M. Beddow, was indicted by the Grand Jury of Jefferson County for the offense of assault with intent to rob (R. p. 1). Petitioner's motion for change of venue (R. pp. 1-6) was overruled (R. p. 10). Petitioner also filed a motion to quash the indictment, (R. p. 6) which was overruled (R. p. 10). Petitioner's motion for a continuance (R. pp. 7 and 8) was granted (R. p. 10). The State's motion for a sanity hearing (R. p. 11) was granted (R. p. 12). Petitioner's second motion for a continuance (R. p. 2a) was overruled (R. p. 5a). Upon pleas of not guilty and not guilty by reason of insanity, trial was had and the jury returned a verdict of guilty (R. p. 12). The Court accordingly adjudged petitioner guilty and sentenced him to imprisonment for fifteen years (R. p. 12). From this judgment and sentence, an appeal was taken to the Alabama Court of Appeals which affirmed by opinion dated December 4, 1956. The Court of Appeals overruled the application for rehearing and a timely appli-

cation for writ of certiorari was denied by the Supreme Court of Alabama on April 25, 1957. Petitioner's application for a rehearing, made to the Supreme Court of Alabama, was overruled by that Court June 27, 1957.

STATEMENT OF THE FACTS

Upon October 23, 1953, at about 11:30 P.M., a masked man entered the automobile service station of Thomas Pierce, pointed a black pistol at Mr. Pierce, who was counting money at his desk, and said, "This is a stick-up. Give me your money" (R. p. 9a). Pierce grabbed the gun hand of the masked man and they commenced a struggle, during which Pierce was able to push the assailant through a window, twisting the gun so that it fell to the floor. The man fled on foot and climbed into a black convertible with a light or white top.

Other evidence confirming the account of the crime was also presented by the testimony of Henry Lucky (R. pp. 18a-22a), H. E. Wear (R. pp. 22a-28a), and J. H. Lakey (R. pp. 28a-33a).

Two confessions by the petitioner were introduced in evidence by the State. The first of these was a written statement made to John J. Pettino, a detective for the City of San Antonio, Texas, who testified at record pages 33a-42a. The statement confirming the details of the hold-up, as testified to by Mr. Pierce, appears at record pages 36a-38a. Pettino said that no one threatened Beddow, the petitioner, offered him any inducement or hope of reward to make the statement (R. p. 34a). The other confession was an oral one made to Lieutenant Glenn V. Evans and Captain Ben F. Walker of the Police Department of the City of

Birmingham, Alabama. Lieutenant Evans, who testified at record pages 57-65, said that Beddow made a statement to him at the police station in San Antonio, Texas where he questioned petitioner concerning the attempted robbery of Pierce's Service Station, and that no one at that time threatened Beddow, abused him, told him that it would be better to make a statement or held out inducements to him to make a statement concerning the attempted robbery (R. p. 58), and that Beddow made an oral statement to him admitting it (R. pp. 59-60). On cross-examination, Lt. Evans said that before the petitioner had made the statement, he, Evans, told him that if he came back and pleaded guilty, he would probably be eligible for probation and that he, Evans, would not oppose it. Captain Walker concurred in this statement (R. p. 63).

Other evidence presented at the trial concerning the defendant's good character, his fits of depression, and that of the two psychiatrists, Dr. Frank Kay and Dr. Wilmot S. Littlejohn, presented an issue for the jury on the question of insanity.

ARGUMENT

This case is one which we would be content to allow this Court to consider upon the petition and brief in support thereof, together with the opinion of the Court of Appeals, except that the Court might think that we did not oppose the granting of this petition or were guilty of treating the problems of judicial review too lightly.

Because the petition and record in this case present only one real question to this Court, namely whether the admission in evidence of the two confessions

was a violation of due process, we shall not discuss at length the denial of the motion for change of venue, the trial court's refusal to grant a further continuance, and the correctness of the trial judge's charge on the issue of insanity, all of which are peculiarly matters of state practice and procedure not reviewable by this Court.

It needs no more than a reading of the Court of Appeals' opinion to see that the motion for change of venue was not well taken. As was stated in that opinion, see petitioner's brief, pages 51 and 52, Jefferson County had a population of five hundred thousand or more and there were over forty thousand names in the jury box. The newspaper accounts of the crime were not inflamatory and the testimony on the defendant's behalf was neither strong nor convincing proof of the need for the change of venue. The Alabama cases dealing with change of venue. **Patton v. State,** 246 Ala. 639, 21 So. 2d 844 and **McLain v. State,** 182 Ala. 67, 62 So. 241, clearly state the Alabama procedural rule that change of venue is a matter in the discretion of the trial judge. This is a well accepted procedural principle which is followed almost universally in the United States.

The same may be said of the application for a continuance. We direct the Court's attention to **Clayton v. State,** 244 Ala. 10, 13 So. 2d 420 and **Wyatt v. State,** 35 Ala. App. 147, 46 So. 2d 837 as relatively recent statements of the Alabama rule on continuances, and point out further that the petitioner had already been granted a twenty-eight day continuance (R. pp. 7, 8 and 10).

The trial judge's oral charge on the quantum of proof necessary to sustain a plea of not guilty by reason

of insanity also fails to present a federal question. The rule in Alabama is that to preserve the record so as to present a question for appellate review of a trial judge's oral charge, the specific portion objected to must be substantially set forth in an exception thereto. This, counsel for the petitioner failed to do at the trial. Thus, under the rule of **Chandler v. State,** 12 Ala. App. 287, 68 So. 536 and **Meeks v. State,** 38 Ala. App. 172, 81 So. 2d 616, cert. denied 263 Ala. 112, 81 So. 2d 619, there was nothing for the Appellate Court to review. That this is an eminently sound rule is self-evident. Otherwise, the defendant is allowed to gamble upon the outcome of a trial without calling to the trial judge's attention any misstatements of the law contained in the charge to the jury.

This Court has held that all of the above questions are matters of state procedure not reviewable by it. **Barrington v. Missouri,** 205 U.S. 483.

Thus the questions are reduced to the single point of the voluntariness of petitioner's two confessions. That the guaranty of the Fifth Amendment to the Constitution of the United States that no person "shall be compelled in any criminal case to be a witness against himself," is not made effective against state action by the Fourteenth Amendment to the Constitution of the United States, is established law.

Twining v. New Jersey, 211 U.S. 78,

Palko v. Connecticut, 302 U.S. 319,

Adamson v. California, 332 U.S. 46,

Snyder v. Massachusetts, 291 U.S. 97,

Foster v. Illinois, 332 U.S. 134,

Therefore, we must see if the means by which Beddow was induced to confess his crime offend the civilized standards of the Anglo-American World.[1]

The petitioner was a high school graduate with service in World War II as a Marine. He had three to four years experience as a police officer (R. p. 71). The testimony of Captain Walker (R. pp. 66-67), on direct examination, and on cross-examination (R. pp. 71-74), fails to show that the questioning was for prolonged periods or at unusual times. In fact, the oral confession was made about two o'clock in the evening (R. p. 73). The only scintilla of evidence of a hope of reward or promise of leniency is found on record page 63. It does not appear that the discussion of probation was made in connection with the confessions, though it appears to have taken place before Beddow confessed. There was no promise of probation, nor promise of leniency. Rather, Lt. Evans said that he, with Captain Walker's concurrence, would not oppose probation.

While like Professor Field, we are uncertain of the location of the "plimsoll line of 'due process,'"[2] it is submitted that the circumstances surrounding the taking of the two confessions in the case at bar do not fall below that line, whether it be Lumber Winter North Atlantic or Tropical Fresh-water. There is in this case none of the humiliating treatment and furtive sequestration of **Malinski v. New York,** 324 U.S. 401. There was none of the relay questioning such as appeared in **Haley v. Ohio,** 332 U.S. 596, **Watts v. Indiana,** 338 U.S. 49, **Turner v. Pennsylvania,** 338 U.S. 62

[1] **Fikes v. Alabama,** 352 U.S. 191

[2] Frankfurter, J. Concurring, 71 Harv. Law Rev. 77.

and **Harris v. South Carolina,** 338 U.S. 68. Nor does the failure to speedily arraign the defendant enter into the consideration of this case since he was a fugitive in another state. The police officers had only a warrant for his arrest. The element of coercion, even psychological coercion, is totally lacking unless the moral ascendancy, which police officers dealing with detained felons almost always have, is alone held to be psychological coercion vitiating the use of a confession as a denial of due process. If this last remnant of the power of the police to question suspected criminals is taken from them, then law enforcement will be relegated to dependency upon remorse alone to compell criminals to seek to relieve the weight of their misdeeds by spontaneous or open court confessions. Reliance on such chancy means makes neither good sense nor good law.

CONCLUSION

For the foregoing reasons this petition for certiorari should be denied.

Respectfully submitted,

JOHN PATTERSON
Attorney General of Alabama

EDMON L. RINEHART
Assistant Attorney General
of Alabama

CERTIFICATE OF SERVICE

I, Edmon L. Rinehart, one of the attorneys for the respondent, The State of Alabama, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of January 1958, I served copies of the foregoing brief in opposition on George Trawick, Empire Building, Birmingham, Alabama, J. Edmund Odum and John T. Batten, 319-22 Frank Nelson Bulding, Birmingham, Alabama, by placing a copy in a duly addressed envelope, with first class postage prepaid, in the United States Post Office at Montgomery, Alabama.

I further certify that this brief in opposition is presented in good faith and not for delay.

Edmon L. Rinehart

EDMON L. RINEHART

Assistant Attorney General of Alabama

Judicial Building
Montgomery, Alabama